Majlis Perbandaran Selayang v Suresh a/l Subramaniam

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-20–06 OF 2023(B)
HASNAH HASHIM, RHODZARIAH BUJANG AND ABDUL KARIM FCJJ
20 FEBRUARY 2025

Tort — Negligence — Legal professional negligence — Plaintiff sued lawyer for mishandling the suit in which it was sued and ordered to pay the plaintiff therein substantial damages — Whether besides proving that lawyer was negligent, plaintiff had to also show that it would have succeeded if not for lawyer's negligence — Whether failure to plead and lead evidence to show that it had a 'real prospect of success' in the suit was fatal to plaintiff's negligence claim against lawyer

The respondent was the appellant's lawyer at all material times. In 2011, a private company ('SLBB') had sued the appellant and three others in the High Court ('Suit 1205') for trespass, negligence and nuisance on the ground that whilst the appellant's developer was carrying out work on the appellant's land — situated next to SLBB's land — the work had encroached onto SLBB's land. Judgment in default with damages to be assessed was entered against the appellant during case management ('CM') on 31 July 2013 when the court found that the respondent (who did not attend the CM hearing) had failed to file the appellant's list of witnesses and witness statements on or before 1 July 2013 as directed by the court earlier. Following assessment of damages — which took place in the respondent's absence — the deputy registrar ordered the appellant to pay SLBB RM6,677,750 in general, special and exemplary damages in addition to interest and costs. After settling the judgment debt at a reduced sum of RM6.3m, the appellant sued the respondent for professional negligence on account of his failure to comply with the court's direction to file the requisite documents by 1 July 2013, his failure to attend the CM on 31 July 2013, failure to apply to set aside the default judgment and failure to inform the appellant of the hearing date for the assessment of damages. The High Court allowed the negligence claim and ordered the respondent to pay the appellant RM6.3m in addition to RM50,000 as general damages and another RM50,000 as exemplary damages plus interest and costs. The Court of Appeal ('COA') set aside the High Court's decision, holding that in addition to showing that the respondent had been negligent, the appellant also had to prove that it had a good chance of success in Suit 1205 if not for the respondent's negligence. The COA held that the appellant's failure to plead or lead evidence to show that it had a 'real prospect of success' in Suit 1205 resulted in the High Court not making a finding on that element, which omission was a fatal misdirection that warranted appellate intervention. The

instant appeal was against the COA's decision.

Held, unanimously dismissing the appeal:

(1) The respondent's contentions that: (a) he was not informed of the first CM date; and (b) that the appellant refused to heed his advice to file an indemnity claim against the actual trespasser, ie, the appellant's developer (as suggested by the High Court judge at the CM hearing after she dismissed the respondent's oral application to set aside the default judgment) were not rebutted by appellant's counsel. And since the appeal records did not contain the notes of proceedings of the CM hearings, this Court could not contradict, but had to accept, the respondent's submission that he was not to be faulted for the entry of the judgments on liability and damages (see paras 20–21).

(2) On the facts of case, the court could not agree with the High Court that the respondent was instrumental and played a crucial role in causing the judgments on liability and damages to be entered against the appellant. Hence, the respondent was not negligent in the discharge of his duty as the appellant's solicitor because the 'but for' test was not satisfied. The 'but for' test established the link between the damages suffered by the appellant and the act of the respondent as the alleged perpetrator. The fact that the appellant had suffered loss of RM6.3m pursuant to the damages ordered against it in Suit 1205 could not be the determinant factor in finding that the respondent had been professionally negligent, because satisfaction of the 'but for' test was the criteria to find if he had been negligent (see paras 16 & 22).

(3) The plaintiff in a professional negligence suit had to demonstrate that it had a real prospect of success in its suit with a third party/parties if not for its lawyer's mishandling of the said suit (see paras 2 & 22).

[Bahasa Malaysia summary

Responden merupakan peguam kepada perayu pada setiap masa yang material. Pada tahun 2011, sebuah syarikat swasta ('SLBB') telah memfailkan saman terhadap perayu dan tiga individu lain di Mahkamah Tinggi ('Guaman 1205') atas dakwaan pencerobohan, kecuaian dan kacau ganggu atas alasan bahawa ketika pemaju perayu menjalankan kerja-kerja di atas tanah milik perayu — yang terletak bersebelahan dengan tanah milik SLBB — kerja-kerja tersebut telah menceroboh ke atas tanah SLBB. Penghakiman ingkar berserta ganti rugi yang akan ditaksir telah dimasukkan terhadap perayu semasa pengurusan kes ('CM') pada 31 Julai 2013 apabila mahkamah mendapati bahawa responden (yang tidak hadir pada pendengaran CM) telah gagal untuk memfailkan senarai saksi dan pernyataan saksi perayu pada atau sebelum 1 Julai 2013 sebagaimana yang telah diarahkan oleh mahkamah sebelum itu. Berikutan penaksiran ganti rugi — yang dijalankan tanpa kehadiran responden —

penolong pendaftar telah memerintahkan perayu membayar SLBB sebanyak RM6,677,750 sebagai ganti rugi am, khas dan teladan, selain faedah dan kos. Setelah menyelesaikan jumlah penghakiman tersebut pada kadar yang dikurangkan iaitu sebanyak RM6.3 juta, perayu telah memfailkan tindakan terhadap responden atas kecuaian profesional berikutan kegagalannya mematuhi arahan mahkamah untuk memfailkan dokumen yang dikehendaki pada atau sebelum 1 Julai 2013, kegagalannya menghadiri CM pada 31 Julai 2013, kegagalan untuk memohon mengetepikan penghakiman ingkar tersebut dan kegagalan memaklumkan kepada perayu mengenai tarikh pendengaran penaksiran ganti rugi. Mahkamah Tinggi telah membenarkan tuntutan atas kecuaian dan memerintahkan responden membayar kepada perayu sejumlah RM6.3 juta, tambahan RM50,000 sebagai ganti rugi am dan RM50,000 lagi sebagai ganti rugi teladan beserta faedah dan kos. Mahkamah Rayuan ('MR') telah mengetepikan keputusan Mahkamah Tinggi tersebut dengan memutuskan bahawa selain daripada membuktikan bahawa responden telah cuai, perayu juga perlu membuktikan bahawa beliau mempunyai peluang yang baik untuk berjaya dalam Guaman 1205 sekiranya tidak berlaku kecuaian oleh responden. MR memutuskan bahawa kegagalan perayu untuk memplidkan atau mengemukakan keterangan yang menunjukkan bahawa beliau mempunyai 'prospek kejayaan yang nyata' dalam Guaman 1205 telah menyebabkan Mahkamah Tinggi tidak membuat sebarang dapatan berkenaan elemen tersebut, yang merupakan suatu kesilapan arah yang serius dan wajar diperbetulkan melalui rayuan. Rayuan semasa ini adalah terhadap keputusan MR tersebut.

Diputuskan, sebulat suara menolak rayuan tersebut:

(1) Hujahan responden bahawa: (a) beliau tidak dimaklumkan mengenai tarikh CM pertama; dan (b) bahawa perayu telah enggan mematuhi nasihatnya untuk memfailkan tuntutan indemniti terhadap pihak yang sebenarnya telah melakukan pencerobohan, iaitu pemaju perayu (sebagaimana yang disarankan oleh hakim Mahkamah Tinggi semasa prosiding CM selepas menolak permohonan lisan responden untuk mengetepikan penghakiman ingkar), tidak dibantah oleh peguam perayu. Memandangkan rekod rayuan tidak mengandungi nota prosiding bagi pendengaran CM tersebut, mahkamah ini tidak dapat menolak, sebaliknya perlu menerima hujahan responden bahawa beliau tidak boleh dipersalahkan atas kemasukan penghakiman terhadap liabiliti dan ganti rugi tersebut (lihat perenggan 20–21).

(2) Berdasarkan fakta kes ini, mahkamah ini tidak bersetuju dengan dapatan Mahkamah Tinggi bahawa responden adalah pihak yang memainkan peranan penting dan menjadi penyumbang utama kepada kemasukan penghakiman terhadap liabiliti dan ganti rugi terhadap perayu. Oleh itu, responden tidak cuai dalam menjalankan tugasnya sebagai peguamcara perayu kerana ujian 'but for' tidak dipenuhi. Ujian 'but for' bertujuan

untuk menilai sama ada terdapat kaitan di antara kerugian yang dialami oleh perayu dengan tindakan responden sebagai pihak yang didakwa menyebabkan kerugian tersebut. Hakikat bahawa perayu telah mengalami kerugian sebanyak RM6.3 juta akibat perintah ganti rugi dalam Guaman 1205 tidak boleh dijadikan faktor penentu dalam membuat dapatan bahawa responden telah cuai secara profesional, kerana pemenuhan ujian 'but for' merupakan kriteria yang perlu dipenuhi bagi membuktikan kecuaian tersebut (lihat perenggan 16 & 22).

(3) Dalam sesuatu tuntutan kecuaian profesional, plaintif perlu membuktikan bahawa beliau mempunyai prospek kejayaan yang nyata dalam tuntutannya terhadap pihak ketiga/pihak-pihak lain sekiranya tidak berlaku kecuaian oleh peguamnya dalam mengendalikan tuntutan tersebut (lihat perenggan 2 & 22).]

Cases referred to

Arthur JS Hall & Co (a firm) v Simons; Barratt v Ansell (trading as Woolf Seddon (a firm)); Harris v Scholfield Roberts & Hill (a firm) [2002] 1 AC 615, CA (refd)

Cork v Kirby Maclean Ltd [1952] 2 All ER 402, CA (refd)

Hijau Biru Envirotech Sdn Bhd v Tetuan Dzahara & Associates (sued as a firm) & Ors [2020] 5 MLJ 549, CA (refd)

Nyo Nyo Aye v Kevin Sathiaseelan a/l Ramakrishnan & Anor [2020] 4 MLJ 380, CA (refd)

Pang Yeow Chow (practising at Messrs YC Pang, Chong & Gordon) v Advance Specialist Treatment Engineering Sdn Bhd [2015] 1 MLJ 490, CA (refd)

Shearn Delamore & Co v Sadacharamani a/l Govindasamy [2017] 1 MLJ 486, CA (refd)

Supramaniam a/l Kasia Pillai v Subramaniam a/l Manickam [2017] MLJU 1590; [2017] MLRAU 425, CA (refd)

Techrew Sdn Bhd v Nurhamizah bt Hamzah (sued as sole proprietor of Chamber of Nur Hamizah Hamzah) & Ors [2022] 4 MLJ 633, CA (refd)

Tetuan Theselim Mohd Sahal & Co & Ors v Tan Boon Huat & Anor [2017] 4 MLJ 207, CA (refd)

Wong Kiong Hung & Anor v Chang Siew Lan (f) [2009] 4 MLJ 183; [2009] 1 MLRA 381, CA (refd)

Appeal from: *Suresh a/l Subramaniam v Majlis Perbandaran Selayang* [2023] MLJU 2051 (Court of Appeal, Putrajaya)

Mohd Faiz bin Abd Rahim (with Archanaa a/p Balasubramaniam) (Rastam Singa & Co) for the appellant.

David Samuel (with Sheena Stephanie Sebastian and Siti Nurul Jannah bt Rizali) (S Suresh Law Chambers) for the respondent.

Rhodzariah Bujang FCJ:

[1] This appeal concerns a claim for professional negligence filed by the appellant against its former solicitor, the respondent, who was at that material time practicing in a legal firm, Messrs Suresh Thanabalasingam, but a partner in Messrs Suresh, Sharvin & Co when this appeal was heard before us. The background facts leading to the filing of the said claim are rather chequered and long winded for it went all the way back to 2011 when one Sykt Lim Beng Brothers ('Sykt Lim', for short) filed a suit (No 22NCVC-1205–12 of 2011) in the Kuala Lumpur High Court against the appellant (as second defendant) and three others, for trespass, negligence and nuisance arising out of an alleged encroachment of its land by the appellant's developer who was doing work on the appellant's land, which was adjacent to that of Sykt Lim's, based on a joint venture agreement between the appellant and the said developer. That suit, hereinafter referred to as Suit 1205, did not proceed to trial for it was struck out against the other three defendants because of Sykt Lim's failure to provide further and better particulars, but as against the appellant, judgment was entered against it on 31 July 2013 during case management of the said date and for damages to be assessed because of the appellant's failure to file a witness list and witness statements on or before 1 July 2013 as directed by Yeoh Wee Siam J (as Her Ladyship then was) during the said case management before her on 29 April 2013. It is to be noted that the said case management and the judgment entered on 31 July 2013 was before another High Court judge, ie, SM Komathy J (as Her Ladyship then was) and notably the respondent was absent during the said proceeding. Pursuant to the said judgment, an assessment of damages proceeded before the learned deputy registrar who made an award of general damages in the sum of RM5,455,000, special damages in the sum of RM202,000, exemplary damages in the sum of RM1,020,750 and with interest at 5% on the said judgment sums from January 2010 until full payment as well as cost of RM20,000, which the appellant fully settled subsequently at a reduced sum of RM6.3m. From the time of filing Suit 1205 until its judicial conclusion, the appellant was legally represented by the respondent. Arising from the civil liability it suffered in Suit 1205 the appellant then filed a claim for professional negligence (No BA-21-NCVC-46–06 of 2016) against the respondent which is the subject matter of the present appeal, based on the following pleaded facts:

(a) during the case management before Yeoh Wee Siam J on 29 April 2013, Her Ladyship not only directed the said filing of the witness list and witness statements on or before 1 July 2013, but also for the filing of agreed facts, issues to be tried, summary of case, common bundle of documents and bundle of pleadings on or before 29 May 2013, ie, one month after the said case management date and the respondent only complied with the latter direction but not the former;

(b) failing to attend the case management proceeding on 31 July 2013 which

resulted in the judgment against the appellant;

(c) failing to set aside the judgment obtained in Suit 1205; and

(d) failing to inform the appellant about the assessment of damages hearing before the learned deputy registrar.

[2] This suit went for full trial and judgment was delivered by the High Court against the respondent and he was ordered to pay the appellants RM6.3m, RM50,000 as general damages, another RM50,000 as exemplary damages, interest at 5%pa on the judgment sums from the date of judgment until full settlement and cost of RM20,000. Dissatisfied with the said decision, the respondent appealed to the Court of Appeal and on 23 November 2022, his appeal was allowed and the High Court decision was therefore reversed and set aside. The appellant was successful in its application for leave to appeal to this court which was granted premised on a sole question of law, which is translated into English as follows:

> *Whether, in a legal professional negligence case, an applicant/plaintiff must prove that the applicant has any real prospect of success in pursuing his defence in the original suit when it had already been found by the High Court that the applicant had suffered the real direct loss resulting from negligence of the respondent when the respondent was ordered to pay for the loss, ie, the RM6.3 million damages.* (Emphasis added.)

[3] Before delving into the merits of this appeal before us and to better understand as well as appreciate the parties' arguments for and against them, it is best that the essence of the judgments of the learned High Court judge and the Court of Appeal judges be laid down first.

HIGH COURT JUDGMENT

[4] The learned High Court judge identified the said issue before him as being whether the respondent, as the appellant's solicitor, had failed to exercise reasonable skill and care in securing and preserving the appellant's interest in Suit 1205. His Lordship relied on *Wong Kiong Hung & Anor v Chang Siew Lan (f)* [2009] 4 MLJ 183; [2009] 1 MLRA 381 on the elements to be proven in a claim for a tort of negligence against a solicitor which are:

(a) the solicitor owes the client a duty of care;

(b) there is a breach of that duty by the solicitor;

(c) the client has thereby suffered damage; and

(d) the damage is not too remote a consequence of the breach.

[5] His Lordship found that the respondent owed a duty of care to the appellant once appointed as its solicitor by the appellant, regardless of whether

it was done pro bono or otherwise ('secara lantikan berbayar') as contended by the respondent and had breached the said duty when he failed to attend the court proceeding on 31 July 2013, by failing to file the list of witnesses and their statements on or before 1 July 2013 as directed by Yeoh Wee Siam J (as Her Ladyship then was) on the 29 April 2013 and he should have written to the court to inform the court, as he alleged, that the appellant would not be calling any witness, if indeed that was true. In His Lordship's opinion, the appellant need not call a witness from the legal profession to testify on the standard of care required of the respondent. His Lordship refused to give credence to the respondent's contention that he was not informed of the transfer of the case from Yeoh Wee Siam J to SM Komathy J because his main and important duty was to file the said documents before 1 July 2013 and regardless of who the judge was, the failure was the same which had led to the imposition of the liability on the appellant and the fixture of the hearing of the assessment of damages on 24 September 2013. His Lordship also disagreed with the respondent that he had, as directed by the learned judge, advised the appellant to make a ground visit to the land and evaluate the trespass and damages, which advice the appellant refused to heed. His Lordship instead found that the respondent's advice to the appellant was in fact otherwise, that is, not to set aside the said judgment because the respondent had told the appellant that setting aside the judgment would be fruitless since the appellant did not put forth any expert who visited the subject land as shown in the question and answer number 15 and 16 of his witness statements which are reproduced below:

> 15.Q: Rujuk kepada perenggan 10 Pernyataan Tuntutan Plaintif, adalah anda bersetuju yang anda tidak mengambil sebarang tindakan untuk mengenepikan Penghakiman Pertama?
>
> A: Saya tidak bersetuju. Saya telah menasihatkan Plaintif untuk memulakan tindakan indemnity dengan segera namun tidak menerima arahan selanjutnya dari Plaintif. Saya telah menasihatkan Plaintif yang percubaan untuk mengenepikan penghakiman bertarikh 31–7–2013 adalah sia-sia akibat keterangan saksi-saksi pakar selepas pemeriksaan tapak secara bersama diadakan.
>
> 16.Q: Bilakah pemeriksaan tapak secara bersama telah diadakan dan bagaimana ianya dijalankan?
>
> A: Pemeriksaan tapak telah dilakukan pada sekitar bulan Mei, 2013 berdasarkan suatu perintah Mahkamah. Peguamcara Lim Beng Brothers Sdn Bhd telah hadir bersama jurutera, juru ukur dan penilai. Sebelum pemeriksaan tapak dimulakan, suatu mesyuarat telah diadakan di pejabat Undang-Undang Plaintif. *Plaintif tidak mahu menghantar mana-mana pegawainya untuk pemeriksaan tapak dan Plaintif telah membekalkan seorang pemandu dan seorang juru teknik untuk memandu arah.* Pemeriksaan tapak dengan perintah Mahkamah tersebut telah diadakan memandangkan pemaju enggan membenarkan wakil Lim Beng Brothers Sdn Bhd melalui tapak pemaju berkenaan untuk akses ke tanah yang telah diceroboh. Saya telah hadir bagi pihak Plaintif semasa pemeriksaan tersebut dan peguam lain yang turun hadir adalah En Amrit Pal Singh dan En AI Nathan. Selepas pemeriksaan

dilakukan saksi-saksi Lim Beng Brothers Sdn Bhd telah mengesahkan butir-butir pencerobohan dan telah membuat pengukuran yang disahkan oleh saya. Selepas 2 minggu, laporan-laporan saksi-saksi pakar Lim Beng Brothers Sdn Bhd telah difailkan di Mahkamah sebagai Ikatan Dokumen Tambahan. (Emphasis added.)

On the other hand, noted the learned High Court judge, the appellant did direct the respondent to file the said application and the respondent's advice to the appellant on the futility of setting aside the judgment was simply to cover up his own negligence and breach of duty for failing to comply with Yeoh Wee Siam J's unless order. This, said His Lordship, is satisfaction of the second element to prove negligence against the respondent by the appellant. In respect of the damages, which is the third element, His Lordship noted that the losses suffered by the appellant was not remote but a direct one from the breach of duty by the respondent and it had paid Sykt Lim RM6.3m vide two cheques, copies of which had been produced at the trial.

COURT OF APPEAL JUDGMENT

[6] The Court of Appeal primarily relied on a decision of another Court of Appeal in *Supramaniam a/l Kasia Pillai v Subramaniam a/l Manickam* [2017] MLJU 1590; [2017] MLRAU 425, which is subsequent to that of *Wong Kiong Hung*'s case relied on by the High Court and which in turn cited with approval another Court of Appeal's decision, also delivered after *Wong Kiang Hung*'s case, ie, *Pang Yeow Chow (practising at Messrs YC Pang, Chong & Gordon) v Advance Specialist Treatment Engineering Sdn Bhd* [2015] 1 MLJ 490 to hold that the appellant must establish its prospect of success in pursuing its case against the respondent, not just establishing that the respondent was careless in the conduct and discharge of his professional duty. The Court of Appeal also noted, as was the infirmity in *Supramaniam*'s case, that the appellant here neither pleaded nor led evidence on the prospect of its success in Suit 1205. This omission, held the Court of Appeal further caused the learned High Court judge to omit making a finding on this element which tantamount to a non-direction and hence a fatal misdirection of law which warranted appellate intervention.

THE MEMORANDUM OF APPEAL

[7] The appellant's memorandum of appeal raised two grounds only and they are in gist as follows:

(a) the Court of Appeal erred in facts and in law when holding that for legal professional negligence, the appellant as the plaintiff must prove a real prospect of success when the High Court had found that the appellant had suffered a direct loss when it had to pay RM6.3m as a result of the respondent's negligence; and

(b) the Court of Appeal erred in facts and in law when it failed to consider that the appellant indeed had a real prospect of success in its defence in Suit 1205.

[8] It is obvious to us, from our reading of the aforesaid two grounds that the sole issue for our determination in this appeal is that of the requirement to prove, by a claimant of such legal professional negligence, of a real prospect of success in the suit conducted by the solicitor concerned and the absence of which, renders the suit baseless, in spite of the proof of negligence on the solicitor's part as alleged. Corollary to that is whether there is a need to call an expert to give evidence on the said prospect.

THE APPELLANT'S SUBMISSION

[9] Learned counsel for the appellant submitted before us that this issue on the prospect of success is only a determinant factor in assessing damages to be awarded by the court. Citing *Supramaniam*'s case, he submitted that the Court of Appeal in the said case had, despite finding the prospect of success of the claimant (the respondent in that case) minimal, which was compounded by his failure to call a legal practitioner to enlighten the court on the said prospect, the negligent act of the appellant in that case had caused the respondent out of pockets expenses for which he was entitled to be compensated reasonably. Thus, the damages awarded by the High Court in *Supramaniam*'s case was reduced from RM200,000 to RM30,000 only. However, submitted learned counsel further, the respondent in this appeal before us had never advised the appellant in writing that their case was weak and hopeless, and only raised this contention when his negligent act as alleged had been committed. More importantly, said learned counsel, the respondent had pleaded in the appellant's defence in Suit 1205 on the existence of a supplementary agreement dated 27 October 2009 entered between it and Sykt Sri Dinar Project Development Sdn Bhd (first defendant in Suit 1205), to relinquish all its rights and control over the project to Sykt Sri Dinar Project Development Sdn Bhd. It was paid in full the acquisition value from the joint venture agreement and having surrendered all its rights and interest to Sykt Sri Dinar Project Development Sdn Bhd's representative, namely Monetary Icon (M) Sdn Bhd, the appellant no longer has any right in the project. Thus, any liability would be saddled on the other defendants and not the appellant. These facts were pleaded in para 2 of the appellant's statement of defence in Suit 1205 and since the claim for trespass allegedly occurred in early 2010 after the appellant had denounced all its interests, rights, control and duty over the joint venture project with Sykt Sri Dinar Project Development Sdn Bhd on the 27October 2009, ie, before the alleged trespass, the appellant indeed has a good prospect to succeed in Suit 1205 taken against it by Sykt Lim. However, because of the respondent's negligence, the appellant was found liable without a full trial. It is an undisputed fact, said counsel that the appellant had paid the RM6.3m as

damages which is a real loss arising from the respondent's negligence and breach of duty. For completeness, the above-mentioned para 2 is reproduced below:

> *Defendan Kedua menafikan keseluruhan Perenggan 2 Pernyataan Tuntutan dan seterusnya menyatakan bahawa Defendan Kedua pernah memasuki suatu Perjanjian Usahasama bertarikh 11–7–2003 dalam kapasiti Defendan Kedua sebagai pemilik tanah Lot-lot 1964, 1965, 1966, 3592, 3593, 3594 dan 3595 Mukim Batu, Daerah Gombak, Selangor Darul Ehsan. Projek usahasama adalah untuk memajukan suatu projek perumahan yang dikenali sebagai 'One Sierra' (selepas ini dirujuk sebagai Projek tersebut). Namun demikian, pada sekitar bulan Oktober, 2009 Defendan Pertama telah membayar Defendan Kedua keseluruhan balasan yang perlu dibayar dan telah menamatkan keseluruhan tanggungjawab dan hak yang timbul dari Perjanjian Usahasama bertarikh 11–7–2003. Defendan Pertama dan Defendan Kedua telah kemudiannya memasuki satu lagi perjanjian tambahan (Supplemental Agreement bertarikh 27–10–2009) untuk melepaskan kesemua hak dan kawalan Defendan Kedua atas Projek tersebut. Defendan Kedua telah dibayar secara penuh keseluruhan nilai perolehan Defendan Kedua melalui Perjanjian Usahasama bertarikh 11–7–2003 setakat 27–10–2009. Defendan Kedua dengan ini telah melepaskan keseluruhan kepentingannya kepada wakil Defendan Pertama iaitu Monetary Icon (M) Sdn Bhd dan Defendan Kedua tidak lagi mempunyai sebarang kepentingan dalam Projek tersebut.* (Emphasis added.)

[10] As for the need for an expert evidence to prove the standard of care required of a solicitor, learned counsel submitted, based on the Court of Appeal's decision in *Nyo Nyo Aye v Kevin Sathiaseelan a/l Ramakrishnan & Anor* [2020] 4 MLJ 380, which was followed in *Hijau Biru Envirotech Sdn Bhd v Tetuan Dzahara & Associates (sued as a firm) & Ors* [2020] 5 MLJ 549 on the non-fatality of producing such an expert as that requirement is not conclusive but dependent on the facts of the case. We paused here to note that *Nyo Nyo Aye*'s case referred to the Court of Appeal's decision in *Shearn Delamore & Co v Sadacharamani a/l Govindasamy* [2017] 1 MLJ 486 and that of *Tetuan Theselim Mohd Sahal & Co & Ors v Tan Boon Huat & Anor* [2017] 4 MLJ 207 and distinguished the aforementioned cases before holding that given the simplicity of the facts of the case before the court ie, a practitioner's duty to inform and advise his client on the consequence of non-payment of the security for cost ordered by the court, the non-calling of such an expert is not fatal to the case unlike that in *Shearn Delamore*'s case, which was on intellectual property and *Tetuan Theselim*'s case which was on a sale and purchase agreement. Given, submitted learned counsel further, that the Court of Appeal in this case before us had not set aside the High Court's finding on liability, the issue of the need to produce expert evidence does not arise.

THE RESPONDENT'S SUBMISSION

[11] On the other hand, learned counsel for the respondent in his written submission submits that the respondent's failure of not producing the witness

list and witness statements was not an act of professional negligence because the appellant never intended to produce any witness for the trial of Suit 1205 anyway, as contended by the respondent in his evidence at the trial which evidence was not rebutted. This was because the managers of the appellant's respective departments had changed and no officer was willing to assist in the defence of the suit. What is more, said learned counsel, none of the appellant's qualified officers participated in the site inspection in relation to Suit 1205, which inspection resulted in a report prepared by Sykt Lim's expert which detailed the encroachments and damage to its land by the appellant. Learned counsel also highlighted the fact that the respondent was not informed of the case management date on the 31 July 2013 which therefore, cannot be an act of professional negligence as his evidence on this was also unchallenged at the trial. Had he been informed of it he could have told the High Court orally (without having to write a letter to the court as contended by the appellant's counsel) about the appellant's stand not to call any witness for the trial of Suit 1205.

[12] The respondent's counsel also highlighted the fact that upon being aware of the said judgment in Suit 1205, the respondent did, at a clarification hearing of the case on 7August 2013, which he sought before SM Komathy J in the presence of Sykt Lim's solicitor, requested for the said judgment be set aside but was informed by Her Ladyship on the option of the appellant initiating an indemnity claim against the trespassers of the Sykt Lim's land, which same advice he conveyed to the appellant but to no avail as admitted by the appellant's witness, En Abdul Razak bin Ahmad during the trial of Suit 1205. That admission appears in the notes of proceedings reproduced at p 117 of the Common Core Bundle and it reads as follows:

> P/D: *En Razak saya tanya sekali lagi, saya katakan pihak Majlis enggan untuk menuntut indemniti walaupun Defendan dalam kes ini telah menasihatkan untuk membuat sedemikian. Setuju atau tidak?*
>
> SP1: *Saya mencadangkan sebab Yang Arif.*
>
> P/D: *Setuju ataupun tidak setelah Defendan dalam kes ini pihak Majlis telah enggan menuntut indemniti, setuju atau tidak?*
>
> SP1: *Setuju.* (Emphasis added.)

[13] Citing the passage in *Shearn Delamore*'s case on the burden of a plaintiff to show that the error committed was one which no reasonably competent member of the relevant profession would have made because the standard of care in negligence action against an advocate is the same as that applicable to any other skilled professional, the respondent's counsel submitted that the respondent indeed had discharged his duty of care to the appellant and was not negligent at all. The damages assessed against the appellant said the respondent's counsel, was because of the appellant's own failure to produce its

own expert report to rebut Sykt Lim's claim of trespass in its expert's report. In other words, there was no causation between the alleged breach by the respondent and the damages suffered by the appellant because the 'but for test' to determine the causation between the two was not satisfied here.

[14] We need to pause here now to say, and without a need for further elaboration, that the 'but for' test first formulated in *Cork v Kirby Maclean Ltd* [1952] 2 All ER 402 is a trite law and well established, ie, whether the damage alleged by the claimant would have occurred 'but for' the negligence of the defendant and if such a damage would still occur regardless of the defendant's conduct, then the causal link is broken.

[15] On the real prospect of success, learned counsel for the respondent iterated that the appellant had failed to prove that its defence in Suit 1205 has a real and substantial, rather than merely a negligible prospect of success. This was because it had knowledge of the trespass and encroachment on Sykt Lim's land but did not participate in the site inspection and produce its own expert reports to counter that of Sykt Lim's, had only pleaded a general denial of the allegation of trespass, nuisance and negligence alleged against it in its statement of defence in Suit 1205 and refused to initiate indemnity claim against the actual trespassers, ie, its developer and associates. Therefore, submitted counsel further, the Court of Appeal was correct to conclude that the appellant's case suffered from the infirmity of not pleading nor adducing evidence on the prospect of success which was the same situation in *Supramaniam*'s case.

OUR DECISION

[16] As laid out in *Arthur JS Hall & Co (a firm) v Simons; Barratt v Ansell (trading as Woolf Seddon (a firm)); Harris v Scholfield Roberts & Hill (a firm)* [2002] 1 AC 615 and cited by the Court of Appeal in *Shearn Delamore*'s case the same standard of care which applies to other skilled professional applies to an advocate (or legal practitioner), which is, that the 'error was one which no reasonably competent member of the relevant profession would have made' and that standard 'is an important element of protection against unjustified liabilities'. Equally important to bear in mind when considering whether this standard of care has been breached is the need to satisfy the 'but for' test which we have laid out earlier in order to establish the link between the damages suffered by the plaintiff as the claimant and the act of the defendant as the alleged perpetrator. The words of Lord Hobhouse of Woodborough in *Arthur JS Hall*'s case are quoted below:

> The standard of care to be applied in negligence actions against an advocate is the same as that applicable to any other skilled professional who has to work in an environment where decisions and exercises of judgment have to be made in often difficult and time constrained circumstances. It requires a plaintiff to show that the

error was one which no reasonably competent member of the relevant profession would have made. This is an important element of protection against unjustified liabilities.

[17] At the outset, we have to state our agreement with the findings of the learned High Court judge that the duty of care beholden upon the respondent is not contingent upon him being paid for his services by the appellant, so therefore, even if such a service was given pro bono, that duty remains and a breach thereof renders the respondent liable. It is also germane, in our view, to summarily dispose of another contention raised in the appellant's written submission, which is on the non-necessity of producing expert evidence. It is to be noted that learned counsel for the respondent neither in his written submission, nor in his oral submission, raised it before us and rightly so because the facts in this appeal are pretty simple and straightforward. Thus, any court making its own assessment based on the law and evidence adduced before it can make a decision without the need for one as was decided by the Court of Appeal in *Techrew Sdn Bhd v Nurhamizah bt Hamzah (sued as sole proprietor of Chamber of Nur Hamizah Hamzah) & Ors* [2022] 4 MLJ 633, which decision learned counsel for the appellant had highlighted before us. In this regard, it is important to mention that this court did, in *Techrew*'s case granted leave against the losing parties (Federal Court Civil Appeal No 02(f)-68–12 of 2021 (J) and No 02(f)-69–12 of 2021 (J)) ie, the respondents in the Court of Appeal to appeal against that decision. My learned sister, Dato' Sri Hasnah bt Dato' Mohammed Hashim FCJ, and I were in that panel hearing the appeal on 14 July 2022 which was chaired by Tan Sri Datuk Nallini Pathmanathan FCJ, where one of the several questions of law framed was this:

> (k) Whether the Court of Appeal is correct in awarding RM2.85m as damages for loss of a chance in the absence of an expert witness in view of the recent Court of Appeal cases of *Tetuan Theselim Mohd Sahal & Co & Ors v Tan Boon Huat & Anor* [2017] 4 MLJ 207 and *Shearn Delamore & Co v Sadacharamani a/l Govindasamy* [2017] 1 MLJ 486, especially when the Plaintiff's Witness ('PW2'), *introduced as an expert witness was rejected by the trial court as an interested witness*; (Emphasis added.)

[18] This court's unanimous decision in the *Techrew*'s case was to allow the appeal in part, which was to remit the case back to the High Court to assess damages due to the appellant on the loss of chance. It is also noted that despite the above highlighted portion of the question as framed above, this court, had in the broad grounds delivered at the conclusion of the hearing, not specifically hold that such an expert is a requirement. This was because it found that the Court of Appeal erred in using the settlement sum given to Techrew Miracle Assets Builder based on a settlement agreement between the parties in a legal dispute in which each set of the respondents has acted for Techrew, ie, the two legal firms. Thus, in view of this recent decision of this court, the issue for a need to call expert evidence has been settled.

[19] Going now to the substantive sole issue before us which is 'the real prospect of success' and given the great reliance placed by the Court of Appeal on *Supramaniam*'s case it is best to first note that the appellant (learned counsel for the respondent) in the said case conceded, as noted in para 12 of the Court of Appeal's judgment, to the findings of the learned High Court judge that he was liable. Hence, the judgment in *Supramaniam*'s case was only in respect of the quantum of damages and therefore as stated in para 14 of the said judgment, the appellant's primary complaint was 'whether the appeal has any prospect of success' is important in determining the quantum of damages. Here before us, the High Court did make an express finding on liability at para 36 of His Lordship's judgment although no such similar one was made by the Court of Appeal which merely stated in para 22 of its grounds of judgment, after considering the case authorities as indicated earlier in our judgment, ie, from paras 20 to 21, that proof of prospect of success is vital and concluded in para 23 that the learned High Court judge's failure to consider the non-pleading or evidence on it was a fatal misdirection. The above-mentioned paragraphs in the aforesaid judgments in this appeal are reproduced below:

> High Court grounds of judgment
>
> [36] Saya beranggapan dari penghakiman pertama ini, defendan hanya menfailkan dokumen-dokumen di peringkat pertama sahaja, ie, pada atau sebelum 29 May 2013. Oleh yang demikian saya berpendapat suatu kecuaian dan pelanggaran tugas berhati-hati telah dilakukan oleh defendan terhadap plaintif iaitu tidak hadir pada 31 July 2013 dan tidak memfailkan penyata dan senarai saksi pada atau sebelum 1 July 2013.
>
> Court of Appeal grounds of judgment
>
> [22] It is therefore plain that besides establishing that the appellant is careless in the conduct and discharge of its professional duty to the respondent, it is also vital that the respondent must establish its prospect of success in defending the case against the respondent. The burden of proof to demonstrate this prospect of success in the case is plainly on the respondent. Although the cases of *Tenaga Nasional Bhd v Tetuan Ariff & Co* and *Muthiah Ramasamy v Muguthan Vadivello* dealt with loss of prospect of a chance to recover from the plaintiff because of solicitor's carelessness, we hold that this requirement of establishing prospect of success in defeating the claim will likewise apply to the case of a defendant's defence, particularly as in the case of the respondent here vis a vis the case.
>
> [23] However, we find that the same infirmity that occurred in the case of *Supramaniam Kasia Pillai v Subramaniam Manickam* recurred here. In this regard, there is neither pleading nor evidence adduced on prospect of success *vis a vis* the case by the respondent before the learned High Court judge. This led to the learned High Court judge omitting to make any finding on the same that tantamount to a non-direction; hence fatal misdirection of law. (Emphasis added.)

Thus, at best it can only be inferred from the above findings, that the Court of Appeal had taken a contrary stand on the finding of liability made by the learned High Court judge. Despite that being only an inference, it still would

A be in the interest of justice to both parties that we state our view on whether there was such a liability in the first place because that is the central focus of the question of law allowed in this appeal.

B **[20]** As stated earlier, the respondent's stand is that he was not liable for the loss suffered by the appellant because he was not informed of the date of the first case management before Yeoh Wee Siam J when that judgment against the appellant was entered and the appellant refusal to heed his advice, which he had earlier obtained from SM Komathy J after Her Ladyship dismissed his oral application to set aside the said judgment, which was to file an indemnity claim against the actual trespasser, ie, the appellant's developer. The appellant's counsel did not, neither in his oral nor written submission, refute the veracity of the above contention, particularly the reason for the respondent's non-attendance at the first mentioned case management and the non-compliance with the learned High Court judge's direction in the second mentioned case management which led to the judgment on liability. Our perusal of the appeal records filed in this appeal also did not disclose the notes of proceedings of the above mentioned two case managements, the absence of which fortifies our acceptance of the respondent's learned counsel's submission, that his client is not to be faulted for the entry of the first judgment on liability.

[21] In respect of the second judgment on damages, again the notes of proceedings before the learned deputy registrar was not included in the appeal records, so much so that we are unable to contradict learned counsel for the respondent's submission that there were directions given to parties to present evidence based on reports prepared at the earlier site inspection. What is patently clear and undisputed is the fact, as stated earlier in our judgment, that the appellant did not send any expert to the site inspection, only a technician and a driver as stated by the respondent in the question and answer 16 and 17 of his witness statements. Question and answer 16 we had reproduced earlier and we would now for completeness reproduce question and answer 17 below:

> 17.Q: *Mengapa Plaintif tidak menghantar sebarang wakil untuk pemeriksaan bersama?*
>
> A: *Tidak ada seorang pegawai Plaintif yang mahu menjadi saksi dalam kes Mahkamah dan Plaintif telah memilih untuk menghantar wakil iaitu seorang juruteknik dari Jabatan Kejuruteraan.* (Emphasis added.)

When we examined the notes of proceeding in the appeal record before us and the cross-examination of the respondent by the appellant's counsel, it was never put to him that what he stated therein in his witness statements was not true. Therefore, given the materiality of the expert evidence on the trespass alleged against the appellant as a co-defendant in Suit 1205, the absence of it points to the high probability that judgment for the sum as assessed by the learned deputy registrar would still stand.

[22] Therefore, based on the above considerations, we are unable to agree with the learned High Court judge that the respondent was instrumental and played a crucial role in the entry of both the judgments on liability and damages against the appellant. Hence, the respondent was not negligent in the discharge of his duty as the appellant's solicitor because the 'but for' test was not satisfied on the facts of this case. In other words, the fact that the appellant had undisputedly suffered the loss of RM6.3m pursuant to the damages ordered against it in Suit 1205 cannot be the determinant factor in the finding of professional negligence against the respondent because a satisfaction of the 'but for' test is the criteria to find him liable for the alleged negligence. If he had been found liable, then it is open to the court to make a consequential finding of whether he should be made liable for the full loss suffered or a fraction of it, ie, the damages issue. Thus, the question of law framed is answered in the positive and accordingly we unanimously dismissed the appeal with cost of RM40,000 subject to allocatur.

Appeal dismissed.

Reported by Ashok Kumar